APPEAL NO. 92017

This appeal arises under the Texas Workers' Compensation Act of 1989 (1989 Act) TEX. REV. CIV. STAT. ANN. arts. 1.01 through 11.10 (Vernon Supp. 1992). On November 25 and December 2, 1991, (hearing officer), presided at this hearing in (city), Texas. He found appellant (claimant herein) failed to sustain his burden of proof and did not show that his injury occurred in the course and scope of employment. Claimant asserts that the failure to find a compensable injury was against the great weight and preponderance of the evidence.

DECISION

Finding that the decision is not against the great weight and preponderance of the evidence, we affirm.

Claimant was employed by (employer) for approximately one year when he was injured. His job was stacking and sanding steel. According to his employer, claimant's chief work at the time of the accident involved handling fairly small steel plates weighing approximately 30 pounds. At the time he was hurt claimant testified he and one other worker were called upon to use a lever to move a rail(s) weighing around 3,000 pounds. In the initial medical report of (Dr. W), claimant's history of injury taken on June 20, 1991 reflected that he and three others were trying to move a machine weighing approximately 500-600 pounds. Claimant said that (LR) was helping him when he had the lever on his shoulder and felt a "sting on his shoulder." He told no one that day. He said his work was lighter the "following day." He also said he told "Mr. M (a supervisor) the following day." He added that after telling Mr. M, he was taken to a clinic, and that day was a Monday. The claim for injury specified (date of injury), as the injury date. In other testimony, claimant said that he reported his injury on a Monday morning; he had worked on Saturday and had been injured on Friday. The earliest medical report is dated June 10, 1991, at 2:50 a.m. in the Emergency Room (ER) of St. Joseph Hospital. An initial medical report of (Dr. E) of Professional Emergency Service Association (PESA) also shows a visit on June 10, 1991, after which claimant was released to do light duty. At this initial visit to Dr. E, claimant apparently did not reveal that the St. Joseph's ER had found his arm to be fractured. Thereafter, his upper left arm was found to be broken as x-rays of June 10 at PESA were evaluated, and he was asked to return on June 11. At that time he saw a different doctor, (Dr. K), also of PESA, who took added x-rays to confirm the fracture. Dr. K, in a letter of July 10, 1991, to National Association Insurance Company, said that claimant reported that the injury was caused by lifting heavy boxes. Dr. K also states claimant was evasive about the ER visit, so he called the ER at St. Joseph's Hospital was then told of claimant's seizure history, treatment with Dilantin, and the broken arm found at the St. Joseph's Hospital ER. Dr. K opines "he was treated for seizures which are the most likely cause of his injuries in an non work-related incident."

Claimant's testimony did include that he awoke at home at approximately midnight,

after working on Saturday, by a severe pain in his shoulder. His daughter took him to St. Joseph's Hospital that night; the next day, Sunday, he said he was "real sick" and told his employer on Monday morning of his injury.

Testimony of (MS), presented by carrier, indicated that he was claimant's supervisor and took him to PESA when the injury was first reported to employer. This witness said claimant told him he did not know exactly where the injury took place. He also said he interviewed LR who was said by claimant to have been with him at the time of injury and LR said "he don't know anything." This supervisor had no knowledge of claimant being assigned any duties involving movement of heavy steel during the period of time in question; he did say it was possible that claimant could have been moved temporarily by someone else out of the warehouse where he was cleaning small steel pieces.

The record does show some variance in claimant's description of what he was doing when he states he was injured--moving a rail, moving machinery, and moving boxes. The question of conflict between the date on the injury claim (date of injury) and the date of the injury as it related to the first medical document (June 10) also went to the credibility of the claimant as judged by the hearing officer. *See* Texas Workers' Compensation Commission Appeal No. 91097 decided January 16, 1992, and Texas Workers' Compensation Commission Appeal No. 91112 decided January 21, 1992. While the initial medical note of his middle-of-the-night visit to an ER states "unable to understand," it does go on to state that there was no trauma history given by the family; it adds that claimant "relates untreated seizure disorder and when he awoke, left shoulder hurting."

In addition to claimant's own acts and testimony, the strongest medical statement as to possible causation comes from Dr. K who stated that seizures could have caused the injury. No witness to claimant's description of the injury was called or appeared through the form of a written statement on behalf of claimant. His supervisor could not even say that claimant was assigned to do the type labor he complained of as causing the problems.

According to Article 8308-6.34(e) of the 1989 Act, the hearing officer weighs evidence and considers credibility. He could view claimant's testimony and information provided to his doctor, supervisor, and at hearing as only creating fact issues for resolution. Burlesmith v. Liberty Mutual Ins. Co., 568 S.W.2d 695 (Tex. App.-Amarillo 1978, no writ). The hearing officer, as trier of fact, judges credibility, assigns weight, and resolves conflicts and inconsistencies, and in so doing may believe all, part, or none of any witness' testimony. Ashcraft v. United Supermarkets, Inc., 758 S.W.2d 375 (Tex. App.-Amarillo 1988, writ denied). We will not substitute our judgment for that of the hearing officer as "sole judge" when his finding is supported by some evidence of probative value and is not against the great weight and preponderance of the evidence. Perry v. Perry Bros., Inc., 753 S.W.2d 773 (Tex. App.-Dallas 1988, no writ).

The decision and order are affirmed.

_____
Joe Sebesta
Appeals Judge

CONCUR:

_____
Stark O. Sanders, Jr.
Chief Appeals Judge

_____
Robert W. Potts
Appeals Judge